United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

15-6119

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-6119

B
P/S

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA),

Plaintiff-Appellee,

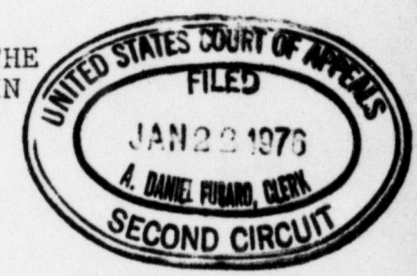
v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant.

On Appeal fron an Order of the United States Court for the Southern District of New York.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS IN SUPPORT OF PLAINTIFF-APPELLEE



GERARD C. SMETANA,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
Borovsky, Smetana, Ehrlich & Kronenberg,
2011 Eye Street, N.W.,
Suite 800,
Washington, D.C. 20006.

Attorneys for the Chamber of Commerce of the United States as Amicus Curiae.

LAWRENCE B. KRAUS,
General Counsel,
RICHARD B. BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N.W.,
Washington, D.C. 20006.

3

TABLE OF CONTENTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-6119

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA),

Plaintiff-Appellee,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant.

On Appeal from an Order of the United States Court for the Southern District of New York.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS IN SUPPORT OF PLAINTIFF-APPELLEE

INTEREST OF THE AMICUS CURIAE[1/]

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over

---

1/ The Employer has consented to the filing of this brief. The amicus is authorized by Abigail Cooley, Assistant General Counsel for Special Litigation, to state that the NLRB and the General Counsel have no objections to the filing of this brief.

three thousand seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before the Supreme Court and this Court.[2/]

The specific issues presented here are (1) whether certain materials relating to unfair labor practice charges against the Employer are subject to disclosure pursuant to the

---

2/ E.g., N.L.R.B. v. Sears, Roebuck and Co., 421 U.S. 132 (1975); Renegotiation Board v. Bannercraft, 415 U.S. 1; Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100, 42 L.W. 4657; Boy's Markets v. Retail Clerks Union, 398 U.S. 235 (1970); H.K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970); Kent Corp. v. N.L.R.B. (CA5, No. 74-1710 pending); Super Tire Engineering Co., et al. v. McCorkle, et al., 416 U.S. 115 (1974); Retired Persons Pharmacy, t/a NRTA-AARP Pharmacy v. N.L.R.B. (CA2, 1975 No. 74-1651, 89 LRRM 2879); Automobile Club of Missouri v. N.L.R.B., CADC 84 LRRM 2423; Kessler v. E.E.O.C., 468 F.2d (CA5, 1973).

terms of the Freedom of Information Act (FOIA) and (2) whether the administrative evidentiary hearing should be restrained pending disclosure of the requested material. Specifically, the material requested includes "copies of all written statements, signed or unsigned, contained in the Board's case file. . ." and procured during the investigation of the unfair labor practice charges.

These issues are of particular concern to the Chamber's members who are frequently parties before the Labor Board's General Cousel in his administrative evidentiary hearings. Moreover, the decision of the court below requiring the General Counsel to disclose the material requested comports with the letter as well as the sound policy underpinning the FOIA and benefits not only employers, but all other groups who appear as defendants before the General Counsel in his evidentiary hearing. Because it has participated as an amicus in N.L.R.B. v. Sears, Roebuck and Co., supra, Kent Corporation v. N.L.R.B., supra, and Automobile Club of Missouri v. N.L.R.B., supra, involving related FOIA issues, and because proper resolution of the issueshere is of vital concern to its members, the Chamber believes it appropriate to present its views to this Court in support of the decision below.

A R G U M E N T

THE PROSECUTORIAL ROLE OF THE NATIONAL LABOR RELATIONS BOARD'S GENERAL COUNSEL AND THE FUNCTIONS OF THE MATERIAL INVOLVED HERE DEMONSTRATE THAT THIS MATERIAL IS SUBJECT TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT.

1. The Objectives of the Freedom of Information Act.

The FOIA represents Congress' broad attempt to permit access to information heretofore unnecessarily concealed from public view and reflects Congressional concern that the public must have a judicially enforceable right to obtain this information from recalcitrant government officials. The Act was a reaction to the history surrounding Section 3 of the Administrative Procedure Act, 5 U.S.C. §1002, which, contrary to the intent of its sponsors, came to be regarded as a statute endorsing governmental secrecy rather than disclosure. Unlike the APA, the FOIA eliminates the "properly and directly concerned" test for access to information and instead provides that official information shall be disclosed "to the public", "for public inspection". Furthermore, the agency attempting to withhold information bears the burden in an expeditious district court hearing to establish that the requested material is expressly

exempt from disclosure.[3] It is now beyond dispute that the FOIA must be construed to make available the maximum information reasonably considered to be embraced within the ambit of that Act.[4] In short, "as the Act is structured, virtually every document generated by an agency is available to the public in one form or another unless it falls within one of the Act's nine exemptions." N.L.R.B. v. Sears, Roebuck and Co., 421 U.S. at page 136.

Furthermore, private parties, such as the Employer here, embroiled in litigation before an agency enjoy a status under the FOIA equal to that of the general public. Thus, the Senate manifested a direct concern for parties involved in controversies with an agency. It said:

> "requiring the agencies to keep a current index of their orders, opinions, etc. is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but has been unavailable to the citizen simply because he had no way in which to discover it..." (S. Rep. No. 813 at 7.)

3/ Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9, 10 (1965).

4/ Sterling Drug, Inc. v. F.T.C., 450 F.2d 698 (CA DC, 1971); Hawkes v. I.R.S., 467 F.2d 787 (CA 6, 1972); Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761 (1961).

The House, too, displayed its concern for the rights of parties who, when involved in agency proceedings, seek information from the agency:

> "Information sought by plaintiffs from Government is likely to be a perishable commodity and...delays...may result in substantive damage to plaintiff's case. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy." (H.R. No. 92-1419, 92nd Cong., 2nd Sess. 2 (1972).)

It is apparent that Congress quite clearly foresaw and intended that the FOIA would be applied to the benefit of parties engaged in litigation before an agency.[5/]

2. The Material Requested Does Not Fall Within Exemptions 5 or 7.

a. Exemption 5.

The Labor Board's General Counsel seeks to foreclose pre-trial disclosure of the material requested here by asserting

---

5/ See also, Cessna Aircraft Co. v. NLRB, ___ F. Supp. ___, 90 LRRM 2376, 2378 (D. Kan., 1975), where the Court observed:

> "The [NLRB] cannot seriously contend...that plaintiff here, simply because it is engaged in litigation before the Board, is relegated to a lesser status than general members of the public who may seek information pursuant to the [FOIA]."

that this material is immune from such disclosure under Exemption 5. In urging this position, the General Counsel asserts that the scope of this exemption is parallel to that of exceptions to civil discovery, relies upon Hickman v. Taylor, 329 U.S. 495 (1947), for the proposition that the material requested here would be immune as work product from civil discovery, and argues that this material is therefore insulated by Exemption 5. However, his reliance upon Hickman is misplaced, since an analysis of that case demonstrates that its principles apply only to a party who, unlike the General Counsel, subscribes fully to the discovery-deposition mechanism. The General Counsel who persistently rejects the civil discovery rules should not be permitted in an FOIA action to successfully resist disclosure by relying on the work-product exception to these rules.

Hickman arose following the sinking of a tugboat, the John M. Taylor. The case involved a suit against the owners of the tugboat, brought under the Jones Act, by the administrator of a drowned crewman. Plaintiff Hickman served 39 interrogatories upon the tug's owners. All of these were answered except one which requested inter alia exact copies of all written statements taken from crew members. The district court ordered that this material be produced, but the Court of Appeals for the Third Circuit reversed.[6/]

6/ Hickman v. Taylor, D.C. Pa. 1945, 4 FRD 479; 153 F.2d 212 (1945).

The Supreme Court affirmed the holding of the Court of Appeals, beginning its analysis of the issues with a warm and unequivocal endorsement of the pre-trial deposition-discovery mechanism.

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." (footnotes omitted) 329 U.S. at 500-501. (emphasis added)

The Hickman court then stated and considered the issues of the case within the context of its endorsement for the deposition-discovery rules. It said:

> "The deposition-discovery rules create integrated procedural devises. And the basic question at stake is whether any of those devises may be used to inquire into materials collected by an adverse party's

counsel in the course of preparation for possible litigation." 329 U.S. at page 505.

After stating this issue, the Court recognized that an attorney's work-product enjoys a qualified immunity from discovery. Thus, the Hickman court held that the written statements there requested were immune from discovery absent a showing of necessity by the parties seeking disclosure. 392 U.S. at pages 510-511.

In reaching this conclusion, the Hickman court emphasized that searching interrogatories had been directed to the defendants and that broad discovery had already occurred. Indeed, the defendants' answers to the the interrogatories would necessarily have provided the plaintiff with all pertinent information gleaned by the defendants' attorney through his interviews with his witnesses. 329 U.S. at 508-509.[7/]

7/ The Hickman court distinguished between the tangible documents a party has assembled and the facts that he has learned from those documents. Only the documents themselves enjoy even a limited immunity. In the Court's words:

> "A party clearly cannot refuse to answer interrogatories on the grounds that the information sought is solely within the knowledge of his attorney." 329 U.S. at 504.

This distinction has carried over into Rule 26(b)(3) FRCP and courts have consistently held that the work-product concept does not insulate from pre-trial discovery by interrogatories or by deposition the facts that a party's attorney has learned, or the persons from whom he has learned those facts. (See cases collected in Wright and Miller, Federal Practice and Procedure, Civil Section 2023, page 194, footnote 16.)

As is apparent from the foregoing, it was in the context of extolling and discussing the mechanism of pre-trial deposition-discovery, that the Hickman court accorded a qualified immunity to an attorney's work product. This immunity was given to those and only to those who otherwise subscribe to the discovery-deposition rules. A party, such as the Labor Board's General Counsel, who intransigently opposes all pre-trial discovery should not be permitted successfully to claim a benefit from an exception to that disclosure mechanism in an FOIA action.[8/] That is, since the Board's General Counsel continues to reject any mechanism whereby the parties may obtain the "fullest possible knowledge of the issues and facts before trial," and instead, continues to require parties embroiled in litigation before him to proceed in the dark, the qualified work-product immunity, insofar as tangible documents are concerned, simply does not apply to accord him any benefit in an FOIA action. If the General Counsel, while opposing pre-trial depositions or interrogatories designed to acquaint a defendant with the issues and facts he must meet, is also entitled to raise Hickman in an FOIA action to shield pre-trial

---

8/ McClain Industries v. N.L.R.B., 381 F. Supp. 187, is but one of a long list of cases where the General Counsel refused to submit to pre-trial discovery and to supply an employer-defendant with a list of persons contacted during an investigation of an unfair labor practice charge so that depositions could be taken. In addition, see Section 102.117, 102.118 of the Board's Rules and Regulations as amended February, 1975.

disclosure of all affidavits and statements taken by him during an investigation, the facts in his possession that may support a defendant appearing before him may forever remain undisclosed. It is not likely that the General Counsel, as prosecutor, will reveal such facts during a trial against this defendant, inasmuch as in this trial he can pick and choose the witnesses he calls and the facts that he introduces.[9/]

The upshot is that whether or not the work-product exception to discovery relating to tangible documents could apply to the material requested here under the FOIA if the General Counsel fully subscribed to the deposition-discovery mechanism, this exception does not exist for him as long as he continues his present policy of rejecting the rules of pre-trial discovery. If the General Counsel wishes to successfully assert

---

9/ It must be observed that under Section 3(d) of the Labor Act, 29 U.S.C. §153(d), the General Counsel is conferred with "...final authority on behalf of the Board, in respect to the investigation of charges and the issuance of complaint under Section 10, and in respect to the prosecution of such complaints before the Board,..." (emphasis supplied) (Hourihan v. N.L.R.B., 201 F.2d 187 (CA DC, 1953), cert. den. 345 U.S. 930; Vaca v. Sipes, 386 U.S. 182 (1967).) The General Counsel's complaints are generally but skeleton documents, providing little if any notice or information to the defendant of the facts that he must meet in the upcoming trial. The General Counsel as prosecutor can select for testimony only witnesses who support him, even where he has facts in his file that may support the defendant's position. Thus, unless the defendant--the Employer here--is able to engage in some form of pre-trial discovery, facts in the General Counsel's possession which may support the defendant's legal position in a trial may forever remain undisclosed to him. The FOIA was enacted to combat this administrative secrecy. (S. Rep. No. 813 at 7 referred to above.)

this qualified exception to discovery--in an action under the FOIA--he must first embrace the precepts of discovery and permit disclosure by interrogatories or by deposition of all relevant facts in his possession and of the persons from whom he has learned these facts.10/

In addition, and independently, the material requested here is not insulated by Exemption 5 because it does not consist of inter-agency or intra-agency memoranda or memoranda prepared by an attorney in contemplation of litigation which set forth his theory of the case and his litigation strategy. On the contrary, the material requested here consists of factual reports secured by the General Counsel in the course of his investigation of an unfair labor practice

---

10/ In view of the recognized responsibilities of government lawyers, it is both astonishing and dismaying that the General Counsel continues to pursue a policy of absolute secrecy. Thus, the Supreme Court has stated in Berger v. United States, 295 U.S. 78, 88 (1935):

> "The United States attorney is the representative of not an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

It is submitted that this statement is fully applicable government counsel in civil or administrative cases and that a defendant in an administrative trial is entitled to pre-trial disclosure of the relevant facts of the case --facts favorable to the government and facts favorable to him.

charge and accordingly this material is not insulated from disclosure by Exemption 5. EPA v. Mink, 410 U.S. at pages 87-93. In the Mink court's words:

> "[virtually] all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." 410 U.S. at p. 89.

Just as did the Mink court, the Congressional commentaries encompassing Exemption 5 also establish a distinction between deliberative and factual memoranda and show that the information requested here is not within the perimeters of that exemption. Thus, Congress envisioned this exemption as foreclosing disclosure only of memoranda reflecting the "frank discussion of legal or policy matters..." It stated:

> "It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subject to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of the general proposition, but it has attemted to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, 89th Cong., 1st Sess. (1965). See also H.R. Rep. No. 1497 at 10. 11/

11/ In hearing on Senate 1160 which ultimately became the

(continued)

In addition to the foregoing, the Supreme Court's decision in N.L.R.B. v. Sears, Roebuck and Co., supra, provides cogent support for the position that the material sought here should be disclosed. Thus, while Sears held that General Counsel's memoranda directing the filing of a complaint were within Exemption 5, the Court did so reluctantly and only because these memoranda "will inexorably contain the General Counsel's theory of the case and may communicate to the Regional Director some litigation strategy or settlement advice...and fall squarely within Exemption 5's protection of an attorney's work-product." 421 U.S. at 159-160. In Sears the memoranda consisted of intra-agency documents from one branch of the General Counsel, the advice branch (the decision maker), to another, the Regional Director (the prosecutor), and for this reason was insulated from disclosure by Exemption 5 as attorney work-product.

11/ (continued)

FOIA, it was stated that "inter-agency or intra-agency memorandums or letters dealing solely with matters of law and policy" would be immune from disclosure. Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess. (1965). Reinforcing the distinction between documents reflecting policy deliberations and those containing factual material, the accompanying Senate Report stated that:

> "[a]ll factual material in Government records [was] to be made available to the public." S. Rep. No. 1219, 88th Cong. 2nd Sess. 7 (1964).

Statements, such as those requested here, stand on an entirely different footing. These statements are not intra-agency memoranda, do not contain the prosecutor's theory of the case and do not reflect any litigation strategy or advice. Rather, these statements contain factual recitals which may provide support for the contentions of a party engaged as a defendant in litigation against the General Counsel. While the FOIA has, to be sure, eliminated the "properly and directly concerned" test, nonetheless it is the value of the material requested here to a party appearing as a defendant before the General Counsel that mandates disclosure under the principles of the FOIA, especially since the General Counsel has persisted in opposing all pre-trial discovery. A contrary construction of the FOIA, one permitting the material requested here to be withheld, will result in defendants litigating against the General Counsel being subjected in the future--as they are at present--to the General Counsel's ardor for the trial by surprise and ambush.

b. Exemption 7.

Exemption 7, as amended and construed by Sears, reflects a Congressional will to delimit the application of that exemption to agency records so that it would apply only to the extent that "the production of such records would

interfere with enforcement proceedings, deprive a person of a right to a fair trial or impartial adjudication, constitute [an]...unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques." Sears, 164-165.[12/] The amendment mandates that the Government "specify some harm in order to claim the exemption " and does not "afford...all law enforcement matters a blanket exemption" 120 Cong. Rec. H 10868 (daily ed. Nov. 20, 1974). The amendment was viewed as narrowing the body of material which could be withheld. 120 Cong. Rec. S 93312 (daily ed. May 30, 1974). Material cannot be exempt merely because it can be categorized as an investigative file compiled for law enforcement purposes. 120 Cong. Rec. S 9329, 9330. If the governmental agency seeking to foreclose disclosure fails in its burden to prove (5 U.S.C. §552(a)(4)(B)) that any of the specific harms enumerated by the amendment exist, the "general philosophy of full agency disclosure" must prevail. N.L.R.B. v. Sears, Roebuck and Co., supra, at 136.

12/ "(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal

(continued)

It is apparent that the General Counsel has not demonstrated that amended Exemption 7 precludes disclosure of the material requested in this case. To be sure, he has asserted that disclosure of this material will interfere with enforcement proceedings by cutting off information from persons who will be reluctant to cooperate in investigations, due to a fear of retaliation if their names or the facts they supply are revealed. However, the General Counsel's forebodings are not a substitute for the proof required by the amended Act, and he has not carried his proof burden in this case.

Moreover, even the General Counsel's assertion does not withstand examination. For example, an employee furnishing a statement to the General Counsel during an investigation of an unfair labor practice charge has a reasonable expectancy that he will be called upon to testify at a public hearing in the presence of his employer. Therefore, it can make little difference to him, insofar as fear of reprisal is concerned,

---

12/ (continued)

> investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel..."

The Supreme Court's Sears decision did not reach the perimeters of Amended Exemption 7 and this Court may, accordingly, construe its scope.

whether his name and the facts that he has supplied to the General Counsel are revealed to his employer before or at the time of trial. This risk of reprisal is logically no greater whether his identity is disclosed before the beginning of the trial or during it.

Furthermore, an employee is fully protected by Sections 8(a)(1), (3) and (4) of the National Labor Relations Act, whether retaliation occurs prior to or following a trial. The Supreme Court has held that Section 8(a)(4) fully protects employees who furnish information to the General Counsel while he is investigating--prior to the inception of the trial--an unfair labor practice charge. N.L.R.B. v. Scrivener, 405 U.S. 117 (1972).[13/] Unless the General Counsel has decided that the safeguards of Section 8(a)(4) are nugatory, he must reasonably believe that an employee's cooperation during an investigation can be secured, if the employee is apprised of the protection granted to him by that statutory section--even where the employee knows that his name and the facts that he supplies will be disclosed to his employer before the trial against his employer begins.

13/ Union members are similarly protected from Union retaliation if they participate in the General Counsel's investigative procedures. N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America and its Local 22 (U.S. Lines, Co.), 391 U.S. 418.

It follows that pre-trial disclosure of the material requested here reasonably cannot be even assumed to frustrate public cooperation during the investigation of unfair labor practice charges. Accordingly, contrary to the General Counsel's assertion, such disclosure cannot be said to interfere with enforcement proceedings.[14/] In short, the General Counsel has not and cannot demonstrate that disclosure of the information requested here is precluded by Exemption 7(A). Conversely, disclosure of this information before the beginning of the administrative trial will enable the employer-defendant to obtain the fullest possible knowledge of the issues and facts that he must confront in the trial and to litigate knowledgably with the General Counsel. It is precisely this right that was intended to be secured by the FOIA. See N.L.R.B. v. Schill Steel Products, Inc., 408 F.2d 803, 805 (CA 5, 1969).

It is also apparent that neither Exemptions 7(C) nor 7(D) support the General Counsel's determination to conduct his trials by surprise. Exemption 7(C) has been restricted to encompass matters which are commonly considered

---

14/ In addition, the General Counsel reasonably cannot claim that his ability to secure the facts necessary to bring a complaint in this case will be impeded by disclosure of the information requested, since the General Counsel has already secured facts that in his judgment are sufficient to warrant a complaint and trial against this Employer. See N.L.R.B. v. Hardeman Garment Corporation, et al., U.S.D.C., W. Tenn., No. C-75-148 (November 25, 1975).

to be private (Ackerley v. Ley, 420 F.2d 1336 (CA DC, 1969), medical records; Wine Hobby U.S.A. v. I.R.S., 502 F.2d 133 (CA 3, 1974), family status; Rural Housing Alliance v. U.S. Department of Agriculture, 498 F.2d 73 (CA DC, 1974), marital status, medical conditions, legitimacy of children). It is unlikely that these personal matters will appear in the material requested here. In any event, there has been no showing by the Board's General Counsel that matters of a personal nature are contained in material sought by the Employer and accordingly any reliance upon Exemption 7(C) in this case is misplaced.

Furthermore, the material sought by the employer here does not fall within Exemption 7(D). As stated, persons supplying information to the General Counsel during his investigation reasonably believe that they will be summoned to testify at a public hearing. Consequently, it is unreasonable to infer that they provide this information with an understanding of "confidentiality" or with an understanding that their identity will be protected.15/

15/ The conference report accompanying the final version of the bill which created Exemption 7(D) states that the term "confidential source" was utilized "to make clear that the identity of a person...may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." S. Rep. No. 93-1200, 93rd Cong., 2nd Sess. 13 (1974). Inasmuch as persons

(continued)

3. The Court Below Properly Enjoined the Administrative Hearing Until the Material Requested Is Disclosed.

It cannot be seriously contended that the court below lacked jurisdiction to enjoin the General Counsel from conducting the administrative hearing until he furnished the information requested by the employer. Renegotiation Board v. Bannercraft, 415 U.S. 1, 20 (1974); F.T.C. v. Dean Foods Co, et al., 384 U.S. 597, 603-604, 608 (1965); Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 9, 13, 17 (1942).

Moreover, due to the General Counsel's administrative scheme, the court below properly exercised its discretion by restraining the General Counsel from continuing his administrative proceedings until he supplied the requested material. Thus, a party, forced to litigate in a formal proceeding against the General Counsel, has but a single evidentiary hearing in which to introduce facts that may support his position. It follows that only if armed with information, such as that requested here, prior to the beginning of that hearing, will he

---

15/ (continued)

providing information to the General Counsel during his investigation of unfair labor practice charges may expect to be called as witnesses in a public hearing, it cannot be said that they have provided information under circumstances from which an assurance of confidentiality could be reasonably inferred. See Poss v. N.L.R.B., U.S.D.C. Col. No. 75-A825, December 17, 1975.

be able to litigate knowledgably and effectively with his adversary, the General Counsel. As stated, the FOIA was enacted to enable persons, including those engaged in litigation against governmental agencies, to deal effectively with those agencies. See S. Rep. No. 813, 89th Cong., 1st Sess. 7 (1965).

Accordingly, as the court below observed, the nature of the General Counsel's administrative scheme is such that a defendant will be irreparably harmed if he is required to litigate without first being furnished information that will enable him to obtain the fullest possible knowledge of the issues and relevant facts.

The General Counsel's administrative process is, on its face, unlike that of the Renegotiation Board in Bannercraft, supra. In discussing the inability of a party before that Board to demonstrate irreparable harm sufficient to warrant a preliminary injunction, the Supreme Court stated that under the procedure of the Renegotiation Board, a litigant may institute a de novo proceeding in the Court of Claims when the renegotiation process is at an end. This proceeding is unfettered by any prejudice from the agency proceeding and free from any claim that the Renegotiation Board's determination is supported by substantial evidence. Significantly, the Supreme Court observed that the usual rights of discovery are available to

an individual before the Court of Claims and the parties are not bound by a prior determination made at any level of the Renegotiation Board structure. 415 U.S. at 23. Unlike the Renegotiation Board's process, a litigant appearing as a defendant before the General Counsel has only one opportunity--the administrative hearing--to appear on the record. He has no opportunity to institute a de novo proceeding in any court and no opportunity to utilize his rights of discovery before any court. Accordingly, unlike a party before the Renegotiation Board, a party engaged in litigation against the General Counsel will suffer irreparable harm if he is unable to obtain information of the issues and facts relevant to his case before the administrative hearing begins.

Further, the failure of the Court of Appeals in Sears, Roebuck and Co. v. N.L.R.B. (473 F.2d 91, CA DC, 1972) to restrain the General Counsel from continuing with his administrative hearing until information requested by Sears was furnished does not foreclose the grant of an injunction in this case. Sears, the party seeking the information--the General Counsel's advice and appeal memoranda--had brought the unfair labor practice charge and had furnished to the General Counsel facts sufficient to warrant issuance of complaint. The General Counsel was prosecuting the case seeking inter alia to sustain Sears' position. Sears' position

was somewhat analogous to that of a co-plaintiff with the General Counsel. Unlike Sears, the employer here is the defendant against the General Counsel; the information it requests will enable it to knowledgably litigate against the General Counsel. However, this information will be useful for this purpose only if it is received before the evidentiary hearing commences. Accordingly, unlike Sears, the Employer here has demonstrated that it will be irreparably harmed unless this hearing is enjoined until the information requested is furnished.

CONCLUSION

For all of the foregoing reasons and those stated by the Employer, the amicus requests that the order below be affirmed.

Respectfully submitted,

GERARD C. SMETANA,
JERRY KRONENBERG,
JULIAN I. SCHREIBER,
Borovsky, Smetana, Ehrlich & Kronenberg,
2011 Eye Street, N.W.,
Suite 800,
Washington, D.C. 20006.

Attorneys for the Chamber of Commerce of the United States as Amicus Curiae.

LAWRENCE B. KRAUS,
General Counsel,
RICHARD B. BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N.W.,
Washington, D.C. 20006.

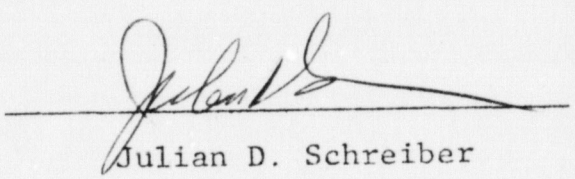
CERTIFICATE OF SERVICE

I, JULIAN D. SCHREIBER, do hereby certify that copies of the foregoing Brief of the Chamber of Commerce of the United States of America as Amicus in Support of Plaintiff-Appellee was sent by first class mail, return receipt requested, on January 21, 1976, to the following:

Robert Lewis, Esq.
Roger S. Kaplan, Esq.
Jackson, Lewis, Schnitzler & Krupman
261 Madison Avenue
New York, New York 10016

Abigail Cooley
Assistant General Counsel for
Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Winifred D. Morio
Regional Attorney
Region 2, National Labor Relations Board
26 Federal Plaza
New York, New York 10007



Julian D. Schreiber